



## **ATTACHMENT H**

### **DENSITY BONUS JUSTIFICATION**

# Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP  
Attorneys at Law  
One America Plaza  
600 West Broadway, 27<sup>th</sup> Floor | San Diego, CA 92101-0903  
Telephone: 619.233.1155 | Facsimile: 619.233.1158  
www.allenmatkins.com

**Timothy M. Hutter**

E-mail: [thutter@allenmatkins.com](mailto:thutter@allenmatkins.com)

Direct Dial: 619.235.1510 File Number: 393470.00001/4856-7981-0412.3

## **Via Email Delivery by Applicant**

June 29, 2023

City of San Marcos  
c/o Chris Garcia, Senior Planner  
1 Civic Center Drive  
San Marcos, CA 92069  
[cgarcia@san-marcos.net](mailto:cgarcia@san-marcos.net)

**Re: GPA22-0003, R22-0003, SDP22-0007 – CAPALINA APARTMENTS**

Dear Mr. Garcia:

This law firm represents Capalina SMA, LLC (“Applicant”) with regarding to the above-referenced development application (the “Project”). We have reviewed your letter dated November 18, 2022 on behalf of the City of San Marcos (“City”), as well as the comments in the Project Issue Matrix issued on February 27, 2023 (the “February Issue Matrix”), and your email discussion with Mr. Rilling about project processing. The purpose of this letter is to provide guidance and additional information relating to the application of state Density Bonus Law (“DBL”) and the Housing Accountability Act (“HAA”) as the City continues its review of the Project application.<sup>1</sup>

## **I. BACKGROUND ON DENSITY BONUS LAW**

### **A. State Density Bonus Law, Government Code Section 65915**

California’s DBL incentivizes the development of affordable housing and other under-produced housing types by providing additional density as well as incentives and waivers to qualifying projects. Cities and counties are required to adopt ordinances to specify how they will comply with the DBL, but failure to adopt such ordinances does not relieve jurisdictions from compliance.<sup>2</sup>

---

<sup>1</sup> This letter and prior similar submissions are intended to satisfy the city’s requirement for an explanation of the application of the DBL to the Project, as specified in comment B(1) in the February Issue Matrix.

<sup>2</sup> Gov. Code § 65915(a).

City of San Marcos

June 29, 2023

Page 2

Projects can qualify for a density bonus and other DBL benefits by meeting a number of different affordability criteria, including reserving a minimum percentage of base units at specified income levels.<sup>3</sup> Affordable units must be subject to a restrictive covenant ensuring that the units will remain affordable for 55 years.<sup>4</sup>

The DBL defines the term “density bonus” as the “density increase over the otherwise maximum allowable gross residential density as of the date of the application by the applicant to the city, county, or city and county, or, if elected by the applicant, a lesser percentage of density increase, including, but not limited to, no increase in density.”<sup>5</sup> Density bonus calculations are to be rounded up to the next whole number. The DBL grants flexibility for local agencies willing to grant greater density bonuses than required by state law, or smaller density bonuses to projects that are only partially compliant with the qualifications under the DBL.<sup>6</sup>

The DBL provides that qualifying projects are entitled to incentives,<sup>7</sup> and codifies the only criteria under which a local jurisdiction can refuse to grant an applicant’s request for incentive:

- The incentive “does not result in identifiable and actual cost reductions... to provide for affordable housing costs... or for rents for the targeted units to be set as specified”;
- The incentive would “have a specific, adverse impact... upon public health and safety or the physical environment or any real property listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low income and moderate-income households; or
- The incentive would be contrary to state or federal law.<sup>8</sup>

The DBL also provides for waivers of development standards that would have the effect of physically precluding the construction of a density bonus development at the density or with

---

<sup>3</sup> Gov. Code § 65915(b)(1)(B).

<sup>4</sup> Gov. Code § 65915(c).

<sup>5</sup> Gov. Code § 65915(f).

<sup>6</sup> Gov. Code § 65915(n).

<sup>7</sup> Technically, the DBL refers to “incentives or concessions.” We simplify by using the term incentives to refer to both.

<sup>8</sup> Gov. Code § 65915(d)(1).

City of San Marcos

June 29, 2023

Page 3

incentives permitted by the DBL.<sup>9</sup> Similar to incentives, an applicant is entitled to reasonable attorneys' fees if a court finds that a waiver was improperly denied, and the burden of proof is on the city to justify the denial. As with incentives, local agencies are not required to grant a waiver request that would be illegal, have a specific adverse impact upon health, safety, or the physical environment where that impact cannot be mitigated, or have any adverse impact on a property on the California Register of Historical Resources, but written findings must be made and supported on one of those grounds.

The DBL also specifies the maximum vehicular parking ratios that can be required for density bonus projects.<sup>10</sup> These parking ratios are separate from the earlier described incentives and waivers, and shall be granted if the project provides the required number of affordable units. Finally, the DBL provides that it "shall be interpreted liberally in favor of producing the maximum number of total housing units."<sup>11</sup>

## **B. City Density Bonus Ordinance**

The City's Density Bonus Ordinance ("DBO"), which implements the DBL, largely refers to state law. San Marcos Municipal Code ("SMMC") Chapter 20.305 codifies the City's approach to density bonus, referring to and tracking the state DBL. SMMC section 20.305.010 states: "this chapter is intended to provide incentives for the production of housing for very low, low and moderate income households, and senior citizen households in accordance with the State's density bonus laws (Sections 65915 through 65918 of the California Government Code)." The DBO incorporates state DBL requirements with respect to incentives, waivers, and parking ratios.<sup>12</sup>

## **II. PROJECT DETAILS**

### **A. Project Background**

Under the proposed MU-2 zoning, the Project site will have a base density of 45 dwelling units per acre. Given a gross site area of 2.51 acres, this equates to a base density of 112.95 units, which is rounded up to 113 units. The Project will restrict 6 units for very low income households earning less than 50% of area median income ("Very Low Income"), which equates to 5 percent of the base units. This entitles the Applicant to a density bonus of 20 percent, or 23 additional units. Therefore, the Project is entitled to a total density of up to 136 total units provided that 6 units are reserved for Very Low Income households. The Applicant proposes to take just 6 density bonus units (a 5% bonus), for a total of 119 units. Therefore, the Applicant proposes 113 market rate units and 6 Very Low Income units.

---

<sup>9</sup> Gov. Code § 65915(e).

<sup>10</sup> Gov. Code § 65915(p).

<sup>11</sup> Gov. Code § 65915(r).

<sup>12</sup> SMMC § 20.305.060

City of San Marcos

June 29, 2023

Page 4

The Project's projected unit count breaks down as follows:

<u>Plan</u>	<u>Total Unit Count</u>	<u>Very Low Income Units</u>	<u>Description</u>	<u>Size (sf)</u>
<b>1</b>	11	3	Studio / 1 Bath	600
<b>2</b>	8	0	1 Bed / 1 Bath	680
<b>3</b>	45	0	1 Bed / 1 Bath	710
<b>4</b>	6	3	2 Bed / 1 Bath	925
<b>5</b>	41	0	2 Bed / 2 Bath	1,080
<b>6</b>	8	0	3 Bed / 2 Bath	1,130
	119	6		

#### **B. Parking Ratio and Requested Incentive**

Based on the above unit types and counts, the maximum required vehicular parking count is 147 spaces, calculated using the ratios provided in Government Code section 65915(p) as follows:

64 units with 0-1 BR                      x              1 space                      =              64 spaces

55 units with 2-3 BR                      x              1.5 spaces                      =              83 spaces

The Project proposes to provide 147 on-site parking spaces as required by the DBL. Comment C8 in the February Issue Matrix identifies a need to address commercial parking as part of the Project. We presume this request is based on SMMC section 20.340.040, which specifies off-street parking standards. As explained previously, we believe that section 20.305.060 of the DBO should control for this DBL-compliant Project, where subsection (C) specifies that "an applicant may submit a request to the City to limit the vehicular parking ratio of a housing development, inclusive of handicapped and guest parking, to the ratios listed under this subsection or any other ratio permitted under Government Code Section 65915, as amended from time to time."<sup>13</sup> When such request is made by an applicant, the DBL makes clear that "a city... shall not require a vehicular parking ratio" that exceeds the ratios specified in section 65915. The DBL and DBO do not distinguish or create a separate allowance for the City to require commercial parking over and above the residential requirements of the statute. Here, the applicant requested that the City accept the provision of 147 on-site parking spaces pursuant to the DBL.<sup>14</sup> We understand that

---

<sup>13</sup> The ratio provided in the City's current density bonus ordinance requires two on-site parking spaces for units with 2-3 bedrooms, which does not reflect more recent revisions to the DBL. Where state law and local code conflict, the statutory language from the DBL will control.

<sup>14</sup> State and local law also make clear that a request for limited parking ratios shall not affect the number of incentives allotted to a project. The parking ratio is an independent benefit of the DBL. See Gov. Code § 65915(p)(8) and SMMC § 20.305.060(C).

City of San Marcos

June 29, 2023

Page 5

you have reviewed this approach with the City Attorney and decided that the City “will require commercial parking for the Project to be located on-site.” While we disagree with the interpretation, our client’s objective is to resolve the issue and allow the Project to move forward and provide much needed housing in this area.

The Project qualifies for one incentive because it provides 5 percent of base units for Very Low Income households.<sup>15</sup> In order to address the City’s commercial parking requirement, our client now proposes to allocate its incentive to this issue. The City is requesting 12 on-site commercial parking spaces in addition to the maximum of 147 that can be required for residential units under the DBL. The applicant proposes an incentive to keep the total number of spaces at 147 (instead of 159). Out of the 147 spaces that would be provided, 5 would be available for commercial uses (instead of 12), and 142 would be available full-time for residential uses. The cost to provide 12 additional spaces would be significant, as reflected in greater detail in the enclosed **Exhibit A**, and summarized as follows:

Good and Roberts, a California engineering and general contracting company, have analyzed the current site plan to add a parking structure for the additional commercial parking, and determined that the addition of 12 commercial parking stalls, and the displacement of 18 existing surface parking stalls, would create the need for a 30 car elevated parking deck. Some items to note are as follows:

- The number of spaces elevated is due to the following: 12 spaces for commercial, 5 spaces for residential and a loss of 13 spaces onsite for ramping / structure.
- This number does not include approximately \$50,000 for soft costs related to the architectural, structural, civil work and permitting needed to add in the structure.
- This number does not include any contingency, which is typically 10% on top of hard and soft costs.
- The total cost, with design soft costs and contingency would be: \$1,462,015 (\$1,329,105 + 132,910) or \$48,734 per parking space.
- The project / site was not designed for a parking structure so the costs per space are high due to structure inefficiency and low number of spaces to spread the cost per space.
- Lastly, the only location to add the structure was at the north west corner parking lot area, however, since we have been working with Vallecitos Water District on a water easement that would prevent that location or any location in the west parking lot area. The other locations are not well suited for an elevated deck.

In addition, there is no evidence that a reduction in the number of parking spaces – commercial or residential – would result in a specific adverse impact to health, safety, or the environment that could not be mitigated.

---

<sup>15</sup> Gov. Code § 65915(d)(2)(B).

City of San Marcos

June 29, 2023

Page 6

The Project also requests waivers for development standards relating to minimum FAR and setbacks. Additional details on that request are provided in the next section.

### **C. Waiver Requests**

The Project application identifies the following waivers:

<b><u>Development Standard Source</u></b>	<b><u>Description</u></b>	<b><u>Incentive or Waiver</u></b>	<b><u>Explanation</u></b>
SMMC § 20.225.050 Table 20.225-2	Minimum FAR	Waiver	This development standard would physically preclude construction of the Project, which meets the requirements of the DBL. As set forth in greater detail below, so long as a proposed project design satisfies the affordability requirements of the DBL, waivers shall be granted unless certain written findings can be made. There is no basis for such findings on this issue.
SMMC § 20.225.050 Table 20.225-2	Minimum Setback	Waiver	Based upon the City's request for additional ROW along Mission Road, the building placement was shifted south, and the setback from Mission Road was reduced to zero feet. Application of this development standard would physically preclude construction of the Project, which meets the requirements of the DBL. As set forth in greater detail below, so long as a proposed project design satisfies the affordability requirements of the DBL, waivers shall be granted unless certain written findings can be made. There is no basis for such findings on this issue.

Compliance with the minimum FAR or setback requirement would require re-design of the Project, which is not permissible under state or local law. The California Court of Appeal has consistently emphasized that waivers must be granted unless the written findings can be made. In *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346-1347 (known as *Wollmer II*), the court flatly stated that "standards may be waived that physically preclude construction of a housing

City of San Marcos

June 29, 2023

Page 7

development meeting the requirements of a density bonus, period. The statute does not say that what must be precluded is a project with no amenities, or that amenities may not be the reason a waiver is needed. Wollmer's argument goes nowhere." Floor Area Ratio and setbacks are expressly identified in the DBL in the definition of "development standard" that can be addressed with a DBL waiver.<sup>16</sup>

#### **D. Concurrent DBL Processing with Discretionary Application**

The grant of a density bonus cannot be interpreted to trigger a general plan amendment, local coastal plan amendment, zoning change, or other discretionary approval.<sup>17</sup> DBL applications may also be processed in conjunction with, or contingent upon, the adoption of plan amendments, zoning changes, or other discretionary actions. Here, where a rezone of the Project site is also proposed by the Applicant, the City must conduct the DBL analysis concurrently, rather than requiring a separate procedure after the rezone is complete. This is particularly important due to the need for analysis relating to the California Environmental Quality Act (CEQA), and the prohibition on project piecemealing in Public Resources Code section 21159.27.

### **III. CONCLUSION**

We hope that the information provided above proves useful to City staff as you continue with your evaluation of the Project. Our client is committed to helping the City to address its housing needs, including units for Very Low Income households, while providing an outstanding product. If you have questions about any of the issues discussed herein, please feel free to contact me directly or work through the project team to arrange a meeting.

Sincerely,



Timothy M. Hutter

TMH

cc: Jon Rilling, Capalina SMA, LLC

---

<sup>16</sup> Gov. Code § 65915(o)(1).

<sup>17</sup> Gov. Code § 65915(f)(5).



PARKING STRUCTURE COST BREAKDOWN				
CAPALINA APARTMENTS				
3/27/2023				
Description: Single level Elevated Concrete Parking Structure including internal Ramping System, fully Fire Sprinklered, and Replaces 30 on grade parking stalls.				
Description	Quantity	Unit	Cost	Amount
Grading for SOG Concrete in lieu of AC Pavemnt	17,000	SF	\$ 2.90	\$ 49,300
Electrical	13,500	SF	\$ 5.60	\$ 75,600
Metal Stairs & Rails, Misc. Metals	4	EA	\$ 35,000.00	\$ 140,000
Fire Extinguishers	9	EA	\$ 350.00	\$ 3,150
Plumbing	13,500	SF	\$ 3.40	\$ 45,900
Signs per Code	1	LS	\$ 10,000.00	\$ 10,000
Concrete Foundation(Footings,Grade Beams)	in CIP	-		in CIP
Concrete SOG	in CIP	-		in CIP
CIP Shear Walls	in CIP	-		in CIP
Concrete Elevated Slab	in CIP	-		in CIP
Cast in Place System	13,500	SF	\$ 36.00	\$ 486,000
Spandrel Panels	in CIP	-		in CIP
Waterproofing top Deck	13,500	SF	\$ 4.00	\$ 54,000
Striping, Wheel Stops	30	EA	\$ 16.00	\$ 480
Fire Sprinkler System per City Requirements	13,500	SF	\$ 3.00	\$ 40,500
Painting Spandrel Panels & Underside Deck	13,500	LS	\$ 2.20	\$ 29,700
Clearance Protection	4	EA	\$ 3,200.00	\$ 12,800
Expansion Joint and Covers	150	LF	\$ 150.00	\$ 22,500
Decorative Screening Element	1	ls	\$ 40,000.00	\$ 40,000
Increase Compacity of Water Quality Basin	1	ls	\$ 40,000.00	\$ 40,000
General Conditions				\$ 161,000
Sub Total				\$ 1,210,930
Fee				60,547
Sub Total				\$ 1,271,477
Excess Liability Insurance				7,629
Total				\$ 1,279,105
Cost per Square Foot	13,500	SF		94.75